

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of)
)
)
For a Declaratory Ruling Regarding the)
Classification of Broadband Over Power)
Line Internet Access Service As)
An Information Service)
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_____)

WCB Docket No. 06-10

COMMENTS OF FIRST COMMUNICATIONS, LLC
ON PETITION FOR DECLARATORY RULING

First Communications, LLC (“FirstCom”), by its attorneys, respectfully submits the following comments on the Petition for Declaratory Ruling filed by the United Power Line Council (“Petition”).¹ For the reasons explained below, FirstCom strongly supports the Petition. The time is ripe for the Commission to classify BPL-enabled Internet access service as an interstate, information service, as the Commission concluded with respect to cable modem based Internet access and wireline broadband Internet access. Moreover, the Commission should conclude that BPL-enabled Internet access does not contain a separate transmission

¹ *See Pleading Cycle Established for Comments on United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, DA 06-49 (rel. Jan. 11, 2006).

component and that neither electric utilities nor BPL providers are compelled to offer transmission capabilities separately.

INTRODUCTION

FirstCom is an Ohio-based competitive telecommunications carrier. FirstCom offers a suite of local, long distance, private line and Internet access services to customers in 15 states, principally in Ohio and the Midwest.

Over the past 18 months, FirstCom has been evaluating the development of Broadband over Power Line (“BPL”) technology. The company has tested the performance and viability of BPL equipment in controlled environments over the past year. In 2006 and 2007, the company intends to launch commercial deployments of BPL if technical, financial and legal impediments are resolved appropriately.

I. THE COMMISSION SHOULD CLASSIFY BPL-ENABLED INTERNET ACCESS AS AN INTERSTATE INFORMATION SERVICE

In the Petition, the United Power Line Council (“UPLC”) asks the Commission to classify Internet access services offered using BPL technologies. BPL-enabled Internet access service is a service that uses electric utility networks equipped with Broadband over Power Line technologies to provide subscribers with Internet access capabilities.² BPL-enabled Internet access service, like Internet access service provided using cable modem or DSL technology, is a functionally integrated, finished service that inextricably intertwines information processing

² The term “Internet access service,” as used here, refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as email, access to web pages and newsgroups. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, __ FCC Rcd __, FCC 05-150, ¶ 9 (Sept. 23, 2005) (*Wireline Broadband Classification Order*).

capabilities with data transmission such that the consumer always uses them as a unitary service.

A. The Commission should classify BPL-enabled services as information services

FirstCom agrees with UPLC that BPL-enabled Internet access is an information service. As UPLC explained, BPL is like cable modem and DSL-based wireline broadband services in all material respects.³ The Commission has already classified both of these services as information services.⁴ In the case of cable modem services, the Commission concluded:

We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service.⁵

Similarly, in the *Wireline Broadband* proceeding, the Commission found that wireline broadband Internet access service is an information service:

[W]ireline broadband Internet access service provided over a provider's own facilities is appropriately classified as an information service because its providers offer a single, integrated service (*i.e.* Internet access) to end users. That is, like cable modem service ..., wireline

³ Petition at 3-5.

⁴ *Notice of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, (2002) (*Cable Modem Declaratory Ruling*), *aff'd sub nom. National Cable Telecommunications Assn. v. Brand X Internet Svcs.*, 125 S. Ct. 2688 (2005); *Wireline Broadband Classification Order*.

⁵ *Cable Modem Declaratory Ruling*, ¶ 38 (footnotes omitted).

broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications These applications encompass the capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications;” and taken together constitute an information service as defined by the Act.⁶

In the *Wireline Broadband Classification Order*, the Commission noted that other technologies could be used to provide Internet access services. Although it did not address the classification of services provided using these technologies, the Commission stated that it would act consistent with the analysis and conclusions it reached with respect to wireline broadband.⁷

The time is ripe for the Commission to classify BPL services. BPL-enabled Internet access service provides the same functionality as cable modem or DSL-based service. As UPLC explained, BPL uses a different technology – amplification of digital signals transmitted over an electrical current – to provide the services that cable modem or DSL-based services also deliver.⁸ Cable modem and DSL-based service now have regulatory parity; BPL-enabled services should receive the same treatment. Therefore, the Commission should grant UPLC’s

⁶ *Wireline Broadband Classification Order*, ¶ 14.

⁷ *Wireline Broadband Classification Order*, ¶ 11 n. 30 (“we will address, where appropriate, any regulatory treatment and other issues associated with such alternative platforms in separate proceedings in a manner not inconsistent with the analysis and conclusions in this Order”).

⁸ BPL potentially enables functionalities not possible using cable modem or DSL-based services, such as power grid management, automated meter reading and other applications which could enhance the safety and reliability of electric utility service. These functionalities are beyond the scope of this proceeding.

Petition and conclude that BPL-enabled Internet access services are information services.

Indeed, although BPL is a new issue for the Wireline Competition Bureau, the Commission is well aware of BPL-based technologies. In 2003, the Office of Engineering and Technology opened a docket to examine “a new type of carrier current technology that provides access to high speed broadband services using electric utility companies’ power lines.”⁹ In that proceeding, and the subsequent NPRM to establish Part 15 rules for BPL equipment, the Commission considered “Access BPL” systems – systems that provide high speed digital communications capabilities over medium voltage power delivery lines.¹⁰ The Commission concluded that Access BPL is a technology with great potential public interest benefits:

Services provided on Access BPL could offer high speed Internet and data communications that compete with, complement, or extend the broadband services provided on existing media. Given the ubiquitous nature of the electric power network, Access BPL could provide a means to expedite the availability of broadband Internet service to consumers and businesses in rural and other underserved areas. We also find that encouraging the deployment of the technology in the United States will support globalization of products and services, promote continued U.S. leadership in broadband technology, and bring important benefits to the American public.¹¹

⁹ *Carrier Current Systems, including Broadband over Power Line Systems*, Notice of Inquiry, 18 FCC Rcd 8498 (2003); *see Amendment of Part 15 regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, Report and Order, 20 FCC Rcd 21265, ¶ 1 (2004) (*BPL Report and Order*).

¹⁰ *BPL Report and Order*, ¶ 5 (describing Access BPL systems).

¹¹ *Id.* at ¶ 13.

Prompt action on the Petition will promote the goals this Commission endorsed just 16 months ago. It will encourage the deployment of a technology with the potential to compete with existing cable modem and DSL-based services, services that currently dominate the broadband market. Commission action also will promote deployment of BPL to areas that may not otherwise have broadband access available. Indeed, FirstCom is exploring a pilot project in an area where there is no DSL based broadband service and only limited cable modem service available.

Classification of BPL-enabled service as an information service also will lessen uncertainty surrounding the regulatory obligations of BPL-enabled services. This will permit entities like FirstCom to make more predictable judgments regarding how to deploy BPL technologies. At a time when there are numerous potential issues concerning the treatment of BPL operators and the rights of utilities in deploying BPL, it is important for the Commission to act decisively to remove one issue from the table – how BPL-based Internet services will be regulated.

B. BPL-enabled Internet access services are inherently interstate services

In addition to classifying BPL-enabled Internet services as information services, the Commission should confirm that these services are inherently interstate in nature. The Commission has consistently found that Internet access is an interstate service.¹² Internet access services allow customers to interact with

¹² E.g., *GTE Telephone Operating Companies*, GTOC Tariff No. 1, Transmittal No. 1148, 13 FCC Rcd 22466 (1998) (GTE ADSL service, which permits

stored information, such as email and newsgroups, which can be stored in servers virtually anywhere around the globe. These communications frequently involve interstate and foreign communications. Moreover, subscribers can access web pages and other information located at any point in the world, again involving interstate or foreign transmissions.

BPL-enabled Internet access services share these same characteristics with other Internet access services. Accordingly, the Commission should make clear that BPL-enabled Internet access services are interstate services and the Commission has exclusive jurisdiction over such services. That is, the Commission should make clear that states are not permitted to regulate a BPL provider's rates, terms and conditions for BPL service, nor to impose entry and exit requirements on BPL-based Internet services. This clarification will provide much needed certainty as states address the legal and regulatory issues attendant to BPL deployment.¹³

II. THE COMMISSION SHOULD AFFIRM THAT BPL-ENABLED SERVICES DO NOT CONTAIN A SEPARATE TRANSMISSION COMPONENT

There is one additional issue that is implicit in the declaratory ruling requested by UPLC, but which should be made explicit by the Commission. After BPL-enabled Internet access is declared to be an interstate information service, the classification of the end user service will be clear. But the Commission should make

customers to connect to ISP services, is an interstate service). *See Cable Modem Declaratory Ruling*, ¶ 59 (“having concluded that cable modem service is an information service, we clarify that it is an *interstate* information service”) (emphasis added).

¹³ *See, e.g.*, S:5, 79th Leg., 2d Called Session (Tex. 2005). .

equally clear that *how* BPL services are deployed is to be left up to the electric utility over whose lines the service is transmitted. In order to do this, the Commission should affirm that BPL-enabled services do not contain a separate transmission component, and that electric utilities (or their BPL operators) are not required to offer transmission capacity separately to others.

Although BPL service is similar to cable modem or DSL services in many respects, the Commission should be aware of one significant difference that makes BPL unique. BPL systems reside on the power transmission networks of electric utilities. The successful deployment and operation of BPL systems must be carefully managed to ensure that, whatever happens with broadband service, the deployment does not in any way interfere with the delivery of electricity to consumers or degrade the reliability of electric power. Reliability and safety are of paramount concern for the electric utility deploying a BPL system.

To protect the reliability of power networks, an electric utility must be given considerable flexibility to determine whether to deploy a BPL system in the first place, and, if it does deploy such a system, how the system will be installed and managed. It must be permitted to decide whether it will operate a BPL system itself, or will contract with a third party BPL operator. Moreover, the utility must be given the discretion to choose which BPL operator will be given access to the system, and on what terms.

As with the other rulings supported in these comments, the Commission does not need to tread new ground to achieve these results. The

Commission merely needs to affirm the conclusion that it reached in the *Cable Modem Declaratory Ruling* that the Internet access services do not contain a separate transmission component.¹⁴ Notably, the Commission's conclusion that cable modem service did not contain a separate transmission component was affirmed by the U.S. Supreme Court in the *Brand-X* case.¹⁵

Electric utilities will no more offer separate transmission capabilities to their BPL subscribers than do cable modem providers offer transmission service to their cable modem subscribers. Electric utilities should not be compelled to offer this service if they do not choose to do so. If an electric utility (or the BPL operator) chooses to offer transmission capacity separately, the utility should receive the same flexibility that wireline broadband providers receive in offering wireline transmission. Namely, the electric utility should be permitted to offer the service on a common carrier basis, pursuant to private carriage arrangements, or not at all.¹⁶

CONCLUSION

For the reasons stated above, the Commission should grant UPLC's Petition and classify BPL-enabled Internet access services as information services. It should re-affirm federal jurisdiction over the services, by confirming that BPL-enabled Internet access is an inherently interstate service. Finally, the Commission should confirm that utilities have the flexibility to

¹⁴ *Cable Modem Declaratory Ruling*, ¶¶ 39-45.

¹⁵ *Brand-X*, 125 S. Ct. at 2704-05.

¹⁶ *See Wireline Broadband Classification Order*, ¶¶ 86-95.

offer BPL transmission capacity to third parties (including potential BPL operators)
on a common carrier basis, on a private carriage basis or not at all.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a cursive "Augustino".

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February 10, 2006